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Eighth report on reservations to treaties

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Addendum

Contents

		Paragraphs	Page
	Introduction	1–32	A/CN.4/535
I.	Withdrawal and modification of reservations and interpretative declarations (continuation and end)	33–68	A/CN.4/535
II.	Formulation of objections to reservations and interpretative declarations — the "reservations dialogue"	69–106	2
	Section 1. Formulation of objections to reservations	73–79	3
	§ 1. Definition of objections to reservations	75–79	4
	A. Content of objections	80–106	5
	1. "Generic" object of objections to reservations	82–106	5

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Note: This report was drafted entirely in French, although some quotations (translated into French by the Special Rapporteur, for which he is solely responsible) are reproduced in their original language.

II. Formulation of objections to reservations and interpretative declarations — the "reservations dialogue"

69. In his second report on reservations to treaties, the Special Rapporteur presented a "provisional general outline of the study".[97] This outline, which was endorsed by the Commission[98] and has been followed consistently thus far, divides part III (Formulation and withdrawal of reservations, acceptances and objections) into three sections, concerning formulation and withdrawal of reservations (A), formulation of acceptances of reservations (B) and formulation and withdrawal of objections to reservations (C). Upon reflection, this order seems illogical; it follows from article 20, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties that in most cases, acceptance of a reservation results from the absence of an objection. It seems preferable, therefore, to begin by describing the procedure for formulating objections — which presupposes active conduct with regard to the reservation on the part of the other contracting parties — before tackling acceptances, which are generally reflected in the parties' silence.

70. Moreover, section C, as envisaged in the outline, contemplates only two issues linked to the formulation of objections, namely, the procedure for their formulation — which is covered in part by article 23, paragraphs 1 and 3, of the 1969 Vienna Convention and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations — and their withdrawal, for which guidelines are given in article 22, paragraphs 2 and 3 (b), and article 23, paragraph 4, of the same conventions. This ignores the whole intermediate procedure, which may or may not culminate in withdrawal or in an intermediate solution, consisting of a dialogue between the reserving State and its partners which are urging it to abandon the reservation. This procedure, which may be termed the "reservations dialogue" and which is probably the most striking innovation of modern procedure for the formulation of reservations, will be the subject of section 2 of this chapter; two other sections are devoted, respectively, to the formulation of objections to reservations (section 1) and to their withdrawal (section 3). A section 4 will deal with equivalent issues linked to interpretative declarations.

71. As in the preceding reports, each of the questions dealt with in this chapter will be presented in the following manner:

- To the extent that they are covered by express provisions of the 1969 and 1986 Vienna Conventions, these provisions will be discussed in the light of the *travaux préparatoires*;

[97] A/CN.4/477, para. 37. This outline was also reproduced in the seventh report (A/CN.4/526), para. 18.

[98] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 116 et seq.

– Such provisions, which should be reproduced in the Guide to Practice,[99] will then be supplemented on the basis of an in-depth study,[100] as far as possible, of practice, jurisprudence and legal doctrine, with a view to:

– Resulting in draft guidelines which are sufficiently clear to enable users of the Guide to find answers to any questions they may have.

72. It should also be noted that only questions relating to the form and procedure for formulating objections to reservations will be addressed. In accordance with the provisional outline,[101] issues relating to the validity and effects of reservations will be covered in subsequent chapters.

Section 1
Formulation of objections to reservations

73. Five provisions of the 1969 and 1986 Vienna Conventions are relevant to the formulation of objections to treaty reservations:

– Article 20, paragraph 4 (b), mentions "in passing" the potential authors of an objection;

– Article 20, paragraph 5, gives ambiguous indications as to the period in which an objection may be formulated;

– Article 21, paragraph 3, confirms the obligation imposed by article 20, paragraph 4 (b), on the author of an objection to state whether the latter therefore opposes the entry into force of the treaty between the author of the objection and the author of the reservation;

– Article 23, paragraph 1, requires that, like reservations themselves, objections be formulated in writing and communicated to the same States and international organizations as reservations; and

– Article 23, paragraph 3, states that an objection made previously to confirmation of a reservation does not itself require confirmation.

74. These various issues will be covered by future chapters in a different order. The plan of this section follows, mutatis mutandis, the one adopted in section 2.1 of the Guide to Practice concerning the form and notification of reservations. Nevertheless, whereas the definition of reservations is the subject of several draft guidelines,[102] objections are not at present defined therein, any more than they are in the Vienna Conventions; the first paragraph of this section will endeavour to fill this gap (and will include comments on the author and content of objections). The

[99] Cf. paragraph (1) of the commentary on draft guideline 1.1 ("Definition of reservations"), *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 237.

[100] The Special Rapporteur, eager to expedite the study of the topic and to respond to the wishes of States and of many of his colleagues in the Commission — wishes he is not certain that he shares, since speed does not seem to satisfy a particular need in relation to such a topic, which it seems to him should preferably be studied tranquilly and in depth, in order to put an end "once and for all" to the uncertainties and ambiguities that are impeding practice — has nonetheless resigned himself to proceeding in a less exhaustive manner than previously.

[101] See sections B and C of part IV (Effects of reservations, acceptances and objections).

[102] See section 1.1 of the Guide to Practice.

subsequent paragraphs will be devoted, respectively, to the form and notification of objections (para. 2) and to the period in which the latter can or should be formulated (para. 3).

§ 1. Definition of objections to reservations

75. The definition of reservations provided in article 2, paragraph 1 (d), of the Vienna Conventions and reproduced in draft guideline 1.1 of the Guide to Practice, contains five elements:

- The first concerns the nature of the act ("a unilateral statement");
- The second concerns its name ("however phrased or named");
- The third concerns its author ("made by a State or an international organization");
- The fourth concerns when it should be made (when expressing consent to be bound[103]); and
- The fifth concerns its content or object ("whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or international organization"[104]).

It seems reasonable to start with these elements in elaborating a definition of objections to reservations.

76. This does not mean, however, that the definition of objections should necessarily include all of them. It appears, in particular, that it would be better not to mention the moment when an objection can be formulated; the matter is not clearly resolved in the Vienna Conventions, and it is probably preferable to examine it separately and seek to respond to it in a separate draft guideline.[105]

77. Conversely, two of the elements in the definition of reservations should certainly be reproduced in the definition of objections, which, like reservations, are unilateral statements whose wording or designation is unimportant if their object makes it possible to characterize them as objections.

78. With regard to the first element, the provisions of the Vienna Conventions leave not the slightest doubt: an objection emanates from *a* State or *an* international organization and can be withdrawn at any time.[106] It does not follow, however, that, like a reservation,[107] an objection cannot be formulated jointly by several States or international organizations. This possibility can be considered at the same time as the more general question of the author of the objection.[108]

79. With regard to the second element, it is sufficient to recall that the law of treaties, as enshrined in the 1969 Vienna Convention, is wholly permeated by the

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[103] See also draft guideline 1.1.2.

[104] See also draft guideline 1.1.1.

[105] See para. 2 below.

[106] Cf. art. 20, para. 4 (b), art. 21, para. 3, and art. 22, paras. 2 and 3 (b). On this subject, see: Roberto Baratta, *Gli effetti delle riserve ai trattati*, Giuffrè, Milan, 1999, p. 341, or Renata Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law* 1970, p. 313.

[107] See draft guideline 1.1.7.

[108] See B below.

notion that the intentions of States take precedence over the terminology which they use to express them. This is apparent from the definition given in the Convention of the term[109] "treaty", which "means an international agreement ... whatever its particular designation".[110] Likewise, a reservation is defined therein as "a unilateral statement, however phrased or named",[111] and the Commission used the same term to define interpretative declarations.[112] The same should apply to objections: here again, it is the intention which counts. The question remains, however, which intention (A) and by whom it can be expressed (B).

A. Content of objections

80. The word "objection" has nothing mysterious about it. In its common meaning, it designates a "reason which one opposes to a statement in order to counter it".[113] From a legal perspective, it means, according to the *Dictionnaire de droit international public*, the "opposition expressed by a subject of law to an act or a claim by another subject of law in order to prevent its entry into force or its opposability to the first subject".[114] The same work defines "objection to a reservation" as follows: "Expression of rejection by a State of a reservation to a treaty formulated by another State, where the aim of the reservation is to oppose the applicability between the two States of the provision or provisions covered by the reservation, or, if such is the intention stated by the author of the objection, to prevent the entry into force of the treaty as between those two States".[115]

81. This latter clarification has its basis in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, which add to the usual definition of objections to reservations (1) an additional requirement (or opportunity), since this provision invites the author of the objection to indicate whether it opposes the entry into force of the treaty between it and the author of the reservation (2).

1. "Generic" object of objections to reservations

82. Any objection to a reservation expresses its author's opposition to a reservation formulated by a contracting party to a treaty, and its intention to prevent the reservation being opposable to it. What is at issue, therefore, is a reaction, and a negative one, to a reservation formulated by another party, it being understood that any reaction of this type is not necessarily an objection.

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[109] In the view of the Special Rapporteur, it is improper to use the term "expression" where the locution so designated consists of a single word. This terminological inflection is, however, enshrined by custom and it does not seem advisable to question it.

[110] Art. 2, para. 1 (a). See also, for example, the Judgment of 1 July 1994 of the International Court of Justice in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, I.C.J. Reports 1994*, p. 120, para. 3: "... international agreements may take a number of forms and be given a diversity of names".

[111] Art. 2, para. 1 (d).

[112] See draft guideline 1.2 and the commentary thereon in *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10) (in particular, paras. (14) and (15)), pp. 232-235, and the examples of "renaming" (ibid., and in the commentary on draft guideline 1.3.2 "Phrasing and name", ibid., pp. 266-274).

[113] *Grand Larousse encyclopédique*, 10 vols.

[114] Jean Salmon, ed. dir., Bruylant/AUF, Brussels, 2001, p. 763.

[115] Ibid., p. 764. It need hardly be stated that this definition applies also to an objection formulated by an international organization.

83. As the court of arbitration which settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Mer d'Iroise* case stated in its decision of 30 June 1997:

> "Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned".[116]

In this case, the court did not expressly take a position on the nature of the United Kingdom's "reaction", but it "acted as if it were an objection",[117] namely, by applying the rule laid down in article 21, paragraph 3, of the 1969 Vienna Convention, which, however, was not in force between the parties.[118]

84. While the award could be criticized in that regard,[119] nonetheless it appears indisputable that the wording of the British statement in question clearly reflects the intention of the United Kingdom to object to the French reservation. The statement reads as follows:

> "The Government of the United Kingdom are unable to accept reservation (b)".[120]

The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning.

85. As the French-British court of arbitration noted, it can happen that a reaction to a reservation, even if critical of it, does not constitute an objection in the sense of articles 20 to 23 of the Vienna Conventions. The reaction may simply consist of observations, in which a State or an international organization announces its (restrictive) interpretation of the reservation or the conditions under which it considers it to be valid. For example, "[i]n 1979, the United Kingdom, Germany and France reacted to the reservation made by Portugal to the protection of property rights contained in Article 1 of the Protocol to the ECHR [European Convention on Human Rights]. By making this reservation, Portugal intended to exclude the sweeping expropriation and nationalisation measures, which had been adopted in the wake of the Carnations Revolution, from any challenge before the European Commission and Court of Human Rights. The reacting states did not formally object to the reservation made by Portugal, but rather made declarations to the effect that it could not affect the general principles of international law which required the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property. Following constitutional and legislative amendments, Portugal withdrew this reservation in 1987".[121]

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[116] *Reports of International Arbitral Awards (RIAA)*, vol. XVIII, pp. 32-33, para. 39.

[117] Pierre-Henri Imbert, "La question des réserves dans la décision arbitrale relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande Bretagne et d'Irlande du Nord", *AFDI* 1978, p. 45.

[118] See below.

[119] See ibid.

[120] See award, *RIAA*, vol. XVIII, p. 162, para. 40.

[121] Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe Publishing, 1999, p. 106; footnotes omitted.

86. The following examples can be interpreted in the same way:

- The communications whereby a number of States indicated that they did not regard "the statements [122] concerning paragraph (1) of article 11 [of the 1961 Vienna Convention on Diplomatic Relations] made by the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the Mongolian People's Republic as modifying any rights or obligations under that paragraph"[123]; the communications could be seen as interpretations of the reservations in question (or of the provision to which they relate) rather than as true objections, particularly in contrast with other statements formally presented as objections;[124]

- The communication of the United States of America regarding the first reservation of Colombia to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, in which the United States Government says that it understands the reservation "to exempt Colombia from the obligations imposed by article 3, paragraphs 6 and 9, and article 6 of the Convention only insofar as compliance with such obligations would prevent Colombia from abiding by article 35 of its Political Constitution (regarding the extradition of Colombian nationals by birth), *to the extent that the reservation is intended to apply* other than to the extradition of Colombian nationals by birth, the Government of the United States *objects to the reservation*"[125]; this is an example of a "conditional acceptance" rather than an objection strictly speaking; or

- The communications of the United Kingdom, Norway and Greece concerning the declaration of Cambodia on the Convention on the International Maritime Organization.[126]

87. Such "quasi-objections", moreover, have tended to proliferate in recent years with the growth of the practice of the "reservations dialogue", which will be

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122 These statements, in which the parties concerned explained that they consider "that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State", they expressly termed "reservations" (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002*, United Nations publication, Sales No. E.03.V.3 (hereinafter *Multilateral Treaties* ...), vol. I, chap. III.3, pp. 87-89.

123 Ibid., p. 89 (Australia); see also p. 90 (Canada), p. 91 (Denmark, France), p. 92 (Malta), p. 93 (New Zealand, Thailand) and p. 94 (United Kingdom).

124 See ibid., statements by Greece (p. 91), Luxembourg and the Netherlands (p. 92), or the United Republic of Tanzania (p. 94) or the more ambiguous statement by Belgium (p. 90). See also, for example, the last paragraph of the communication of the United Kingdom concerning the reservations and declarations accompanying the instrument of ratification deposited by the Union of Soviet Socialist Republics to the 1969 Vienna Convention on the Law of Treaties (ibid., vol. II, chap. XXIII.1, p. 300) or the reaction of Norway to the corrective "declaration" of France dated 11 August 1982 regarding the 1978 Protocol to the International Convention for the Prevention of Pollution from Ships (MARPOL) of 1973 (a declaration that clearly appears to be a reservation and to which Sweden and Italy had objected as such) stating that it considered it to be a declaration and not a reservation (*Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions*, J/7772, p. 81, note 1).

125 *Multilateral Treaties* ..., vol. I, chap. VI.19, p. 419; italics added. Colombia subsequently withdrew the reservation (ibid., p. 420, note 11).

126 Ibid., vol. II, chap. XII.1, p. 9, note 12.

discussed in section 2 below. What the dialogue entails is that States (for the most part European States) inform the reserving State of the reasons why they think the reservation should be withdrawn, clarified or modified. Such communications may be true objections, but often they merely open a dialogue that could lead to an objection but could also result in the modification or withdrawal of the reservation. The reaction of Finland to the reservations made by Malaysia on its accession to the Convention on the Rights of the Child of 1989 clearly falls into the first category and undoubtedly constitutes an objection:

> "The reservation made by Malaysia covers several central provisions of the [said Convention]. The broad nature of the said reservation leaves open to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention. In the view of the Government of Finland reservations of such comprehensive nature may contribute to undermining the basis of international human rights treaties.
>
> "The Government of Finland also recalls that the said reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. It is in the common interest of the States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfil the object and purpose of the treaty. Moreover, the internal legislation as well as the national policies are also subject to changes which might further expand the unknown effects of the reservation.
>
> "In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation*. The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.
>
> "The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention]."[127]

88. Whether or not the reaction of Austria to the same reservations, a reaction also thoroughly reasoned and directed toward the same purpose, can be considered an objection is more debatable; Austria's statement of 18 June 1996 contains no language expressive of a definitive rejection of the reservations of Malaysia and suggests instead a waiting stance:

> "Under article 19 of the Vienna Convention on the Law of Treaties, which is reflected in article 51 of the [Convention on the Rights of the Child], a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with the object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.

[127] Ibid., vol. I, chap. IV.II, pp. 294-295 — italics added. For even clearer objections to the reservations of Malaysia, see the statements of Germany, Ireland, the Netherlands, Norway, Portugal and Sweden and the communications of Belgium and Denmark (ibid., pp. 294-298). Malaysia subsequently withdrew part of its reservations (see ibid., p. 301, note 26).

"The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations *a final assessment as to its admissibility under international law cannot be made without further clarification.*

"Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].

"Austria, however, objects to the admissibility of the reservations in question *if* the application of this reservation negatively affects the compliance of Malaysia ... with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

"Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties *unless* Malaysia ..., *by providing additional information or through subsequent practice*, ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention]."[128]

Here again, rather than a straightforward objection, the statement can be considered a conditional acceptance (or conditional objection) with a clear intent (to induce the reserving State to withdraw or modify its reservation) but with uncertain legal status and effects, if only because the conditions for accepting or rejecting the reservation are not susceptible to an objective analysis and no particular time limit is set.

89. Such statements pose problems comparable to those raised by communications in which a State or an international organization "reserves its position" regarding the validity of a reservation made by another party, particularly with regard to their validity *ratione temporis*.[129] For example, there is some doubt as to the scope of the statement of the Netherlands to the effect that the Government of the Netherlands "reserves all rights regarding the reservations made by the Government of Venezuela on ratifying [the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone] in respect of article 12 and article 24, paragraphs 2 and 3".[130] The same could be said of the statement of the United Kingdom to the effect that it was "not however able to take a position on [the] purported reservations [of the Republic of Korea to the International Covenant on Civil and Political Rights] in the absence of a sufficient indication of their intended effect, in accordance with the terms of the Vienna Convention on the Law of Treaties and the practice of the Parties to the Covenant. Pending receipt of such indication, the Government of the United Kingdom reserve their rights under the Covenant in their entirety".[131] Similarly, the

[128] Ibid., p. 294 — italics added. See also the reaction of Sweden to Canada's reservation to the Espoo Convention of 25 February 1991, ibid., vol. II, chap. XXVII.4, p. 396.

[129] See below.

[130] *Multilateral Treaties* ..., vol. II, chap. XXI.1, p. 215. See also the examples given by Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Institute, The Hague, 1986, pp. 318 and 336 (Canada's reaction to France's reservations and declarations to the Convention on the Continental Shelf).

[131] *Multilateral Treaties* ..., vol. I, chap. IV.4, p. 181. See also the communication of the Netherlands concerning the Australian reservations to article 10 of the Covenant (ibid., p. 178); on the other hand, the reaction of the Netherlands to the Australian reservations to articles 2 and

nature of the reactions of several States[132] to the limitations that Turkey had set on its acceptance of the right of individual petition under former article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe is not easy to determine. These States, using a number of different formulas, communicated to the Secretary General of the Council of Europe that they reserved their position pending a decision by the competent organs of the Convention, explaining that "the absence of a formal and official reaction on the merits of the problem should not ... be interpreted as a tacit recognition ... of the Turkish Government's reservations".[133] It is hard to see these as objections; rather, they are notifications of provisional "non-acceptance" associated with a waiting stance.

90. By contrast, an objection involves taking a formal position seeking, at the minimum, to prevent the application of the "provisions to which the reservation relates ... as between the reserving State or organization and the objecting State or organization to the extent of the reservation", to borrow the language of article 21, paragraph 3, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

91. It does not follow that other reactions, of the same type as those mentioned above,[134] which the other parties to the treaty may have with respect to the reservations formulated by a State or an international organization are prohibited or even that they produce no legal effects. It simply means that they are not objections within the meaning of the Vienna Conventions and their effects are not those envisaged in article 21, paragraph 3, of those conventions. Rather, they relate to the interpretation of the treaty or the unilateral acts constituted by the reservations, or else they form part of the "reservations dialogue", whose components will be analysed more carefully in section 2 of the present chapter.

92. These uncertainties clearly illustrate the value of using precise and unambiguous terminology in the description of reactions to a reservation, in the wording and in the definition of the scope which the author of an objection intends to give to it.[135]

93. As to the first point — the description of the reaction — the most prudent solution is certainly to use the noun "objection" or the verb "object". Such other

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50 of the Covenant has more the appearances of an interpretation of the reservations in question (ibid., p. 178).

[132] Belgium, Denmark, Luxembourg, Norway and Sweden. Such limitations do not constitute reservations within the meaning of the Guide to Practice (cf. the second paragraph of draft guideline 1.4.6), but the example (given by J. Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe Publishing, 1999, p. 107) is nonetheless striking by analogy.

[133] Statement of Luxembourg. The text of these different statements is reproduced in the judgment of 23 March 1995 of the European Court of Human Rights in the case of Loizidou v. Turkey (Preliminary Objections) (series A, vol. 310, pp. 12-13, paras. 18-24).

[134] Paras. 84-88.

[135] See in this respect the "Model response clauses to reservations" appended to Recommendation No. R (99) 13 adopted on 18 May 1999 by the Committee of Ministers of the Council of Europe. It should be noted that all the alternative wordings proposed in that document expressly utilize the word "objection". On the disadvantages of vague and imprecise objections, see F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Institute, The Hague, 1986, pp.184-185; see also pp. 191-197 and 221-222.

terms as "opposition/oppose",[136] "rejection/reject",[137] and "refusal/refuse" must also, however, be regarded as signifying objection. Unless a special context demands otherwise, the same is true of expressions like "the Government of ... does not accept the reservation ..."[138] or "the reservation formulated by ... is impermissible/unacceptable/inadmissible".[139] Such is also the case when a State or an international organization, without drawing any express inference, states that a reservation is "prohibited by the treaty",[140] "entirely void"[141] or simply "incompatible with the object and purpose" of the treaty, which is extremely frequent.[142] In these last cases, this conclusion is the only one possible given the provisions of article 19 of the 1969 and 1986 Vienna Conventions: in such cases, a reservation cannot be formulated and, when a contracting party expressly indicates that this is the situation, it would be inconceivable that it would not object to the reservation.

94. This being so, despite the contrary opinion of some writers,[143] no rule of international law requires a State or an international organization to state its reasons for an objection to a reservation. Except where a specific reservation is expressly authorized by a treaty,[144] the other contracting parties are always free to reject it and even to enter into treaty relations with its author. A statement drafted as follows:

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[136] See also the objection of Finland to the reservation by Malaysia to the Convention on the Rights of the Child, para. 87, above.

[137] See, for example, the objection of Guatemala to the reservations of Cuba to the Vienna Convention on Diplomatic Relations of 1961 (*Multilateral Treaties* ..., vol. I, chap. III.3, p. 92).

[138] See, for example, the objections of the Australian Government to various reservations to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (*Multilateral Treaties* ..., vol. I, chap. IV.1, p. 125) and of the Government of the Netherlands to numerous reservations to the Convention on the High Seas of 1958 (ibid., vol. II, chap. XXI.2, p. 221). See also the British objection to French reservation (b) to article 6 of the Geneva Convention on the Continental Shelf, para. 84, above.

[139] See, for example, the reaction of Japan to reservations made to the Convention on the High Seas of 1958 (*Multilateral Treaties* ..., vol. II, chap. XXI.2, p. 221) or that of Germany to the Guatemalan reservation to the Convention relating to the Status of Refugees of 1951 (ibid., vol. I, chap. V.1, p. 336).

[140] See, for example, all the communications relating to the declarations made under article 310 of the United Nations Convention on the Law of the Sea of 1982 (*Multilateral Treaties* ..., vol. II, chap. XXI.6, pp. 257-259).

[141] See, for example, the reactions of the European Community to the declarations of Bulgaria and the German Democratic Republic regarding the TIR Convention of 1975 (ibid., vol. I, chap. XI A.16, pp. 556-557).

[142] See, for example, the statement by Portugal concerning the reservations of Maldives to the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (ibid., vol. I, chap. IV.8, p. 245) and that by Belgium concerning the reservations of Singapore to the Convention on the Rights of the Child of 1989 (*Multilateral Treaties* ..., vol. I, chap. IV.11, p. 294).

[143] Liesbeth Lijnzaad (*Reservations to UN-Human Rights Treaties — Ratify and Ruin?*, Nijhoff, Dordrecht, 1994, p. 45) cites in this respect R. Kühner, *Vorbehalte zu multilateralen völkerrechtlichen Vertrage*, Berlin, 1986, p. 183 and R. Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, 1970, p. 309; where the last-mentioned author is concerned, this does not, however, appear to be her true position. Practice demonstrates that States do not feel bound to state the reasons on which their objections are based; see, inter alia, F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Institute, The Hague, 1986, p. 131 and pp. 209-219.

[144] See in this respect the arbitral award of 30 June 1977 in the *Mer d'Iroise* case: "Only if the Article had authorised the making of specific reservations could parties to the Convention be understood

"The Government ... intends to formulate an objection to the reservation made by ..."[145]

is as valid and legally sound as a statement setting forth a lengthy argument.[146] There is, however, a recent but unmistakable tendency to specify and explain the reasons justifying the objection in the eyes of the author. This tendency, which seems to be instituting a "reservations dialogue",[147] should doubtless be encouraged.

95. As to the effect which the author of the objection intends it to have,[148] it is not always sufficient to rely implicitly on the rule laid down in article 21, paragraph 3, of the Vienna Conventions:[149] it may be that the State or international organization which intends to object wishes to modulate the effects of that position. In particular, it is apparent from established practice that there is an intermediate stage between the "minimum" effect of the objection, as envisaged by this provision, and the "maximum" effect, which results from the intention expressed by the author of the objection of preventing the treaty from entering into force between itself and the author of the reservation, in accordance with the provisions of article 20, paragraph 4 (b).[150] There are situations in which a State wishes to be associated with the author of the reservation while at the same time considering that the exclusion of treaty relations should go beyond what article 21, paragraph 3, provides.[151] Clearly, such effects are not automatic and must be expressly indicated in the text of the objection itself.

96. Similarly, if there exists, as some writers think,[152] a "super-maximum" effect, consisting in the determination not only that the reservation objected to is not valid

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as having accepted a particular reservation in advance" (*RIAA*, vol. XVIII, p. 32, para. 39). Pierre-Henri Imbert even thinks that an expressly authorized reservation can be objected to (*Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, pp. 151-152). This question will be considered when the scope of article 20, para. 1, of the Vienna Conventions is discussed.

145 Among the many examples, see the statement by Australia concerning the reservation of Mexico to the Convention on the High Seas of 1958 (*Multilateral Treaties* ..., vol. II, chap. XXI.2, p. 220) and those by Belgium, Finland, Italy, Norway and the United Kingdom with respect to the International Convention on the Elimination of All Forms of Racial Discrimination of 1966 (ibid., vol. I, chap. IV.2, pp. 140-143).

146 For an example, see para. 87, above.

147 See section 2, below.

148 It will be recalled that the purpose of this chapter is not to study the effects of an objection; the question is raised here only insofar as it is relevant to the *formulation* of an objection.

149 According to this provision in the 1986 text: "When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation".

150 See section 2, below.

151 See, for example, Canada's objection to Syria's reservation to the 1969 Vienna Convention: "... Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable". For other examples and for a discussion of the permissibility of this practice, see below. See also Richard W. Edwards, Jr., "Reservations to Treaties", *Michigan Journal of International Law*, 1989, p. 400.

152 See Bruno Simma, "Reservations to human rights treaties — some recent developments" *in* Liber Amicorum, *Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday*, Kluwer, The Hague, 1998, pp. 667-668.

but also that, as a result, the treaty as a whole applies ipso facto in the relations between the two States, this certainly should be mentioned in the statement made in reaction to the reservation, as Sweden did in its "objection" of 27 November 2002 to the reservation which Qatar made when acceding to the Optional Protocol of 25 May 2000 to the Convention on the Rights of the Child:

> "This objection shall not preclude the entry into force of the Convention between Qatar and Sweden. The Convention enters into force in its entirety between the two States, without Qatar benefiting from its reservation".[153]

97. Whatever the validity of such a statement,[154] it is doubtful whether it qualifies as an objection within the meaning of the Vienna Conventions: the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two Parties but to render the reservation null and void without the consent of its author. This greatly exceeds the consequences of the objections to reservations provided for in article 21, paragraph 3, and article 20, paragraph 4 (b), of the Vienna Conventions. Whereas "unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State",[155] in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection.

98. In view of the foregoing considerations, the definition of an objection to a reservation could be included in draft guideline 2.6.1 — which would be placed at the head of section 2.6 of the Guide to Practice, entitled "Procedure regarding objections to reservations"[156] and might read as follows:

2.6.1. *Definition of objections to reservations*

> "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.

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[153] *Multilateral Treaties* ..., vol. I, chap. IV.11.C, p. 318; see also Norway's objection of 30 December 2002 (ibid.).

[154] Which can be recommended on the basis of the position adopted by the organs of the European Convention on Human Rights and General Comment No. 24 of the Human Rights Committee (see the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 196-201), but is hardly compatible with paragraph 10 of the Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights, adopted in 1997 (see *Yearbook* ... 1997, vol. II, Part Two, p. 57, para. 157) or with the principle *par in parem non habet juridictionem*. "To attribute such an effect to the rejection of the reservations is not easy to reconcile with the principle of mutuality of consent in the conclusion of treaties" (Arbitral award of 30 June 1977 in the *Mer d'Iroise* case, *RIAA*, vol. XVIII, p. 42, para. 60). This matter will be studied further when the question of the effects of objections is taken up.

[155] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 419.

[156] This draft guideline could be placed in chapter 1 of the Guide to Practice (Definitions). However, the Special Rapporteur believes that it would be preferable to group together all the guidelines concerning objections in section 2.6.

99. This definition was modelled very closely on the definition of reservations given in article 2, paragraph 1 (d) of the Vienna Conventions of 1969 and 1986 and reproduced in draft guideline 1.1 of the Guide to Practice. It reproduces all its elements,[157] with the exception of the time element, for the reasons indicated above.[158] Apart from the foregoing considerations, certain aspects of the proposed definition call for a few additional remarks.

100. First, the Special Rapporteur is not suggesting that this definition should include a detail found in article 20, paragraph 4 (b) of the Vienna Convention of 1986, which refers to a "*contracting* State" and a "*contracting* international organization".[159] There are two reasons for this:

On the one hand, article 20, paragraph 4 (b) settles the question whether an objection has *effects* on the entry into force of the treaty between the author of the reservation and the author of the objection; however, it leaves open the question whether it is possible for a State or an international organization that is not a contracting party in the meaning of article 2 (f) of the Convention ... to make an objection; the possibility that such a State or an organization might formulate an objection cannot be ruled out, it being understood that the objection would not produce the effect produced in article 20, paragraph 4 (b) until the State or organization has become a "contracting party". Moreover, article 21, paragraph 3, does not reproduce this detail and refers only to "a State [*tout court*] or an international organization [*tout court*] objecting to a reservation"; this aspect will be studied more closely below.[160]

On the other hand, the definition of reservations itself gives no information about the status of a State or an international organization that is empowered to formulate a reservation.

101. Second, the phrase "in response to a reservation" also deserves comment. According to the wording of draft guidelines 2.3.1 to 2.3.3, the contracting parties may also "object" not to the reservation itself but to the late formulation of a reservation. In its commentary on draft guideline 2.3.1, the Commission wondered whether it was appropriate to use the word "objects" to reflect the second hypothesis and noted that, given the possibility for a State to accept the late formulation of a reservation but object to its content, some members "wondered whether it was appropriate to use the word 'objects' in draft guideline 2.3.1 to refer to the opposition of a State not to the planned reservation, but to its late formulation. Nevertheless, most members took the view that it was inadvisable to introduce the distinction formally, since in practice the two operations are indistinguishable."[161] This position leads one to ask whether the distinction between the two meanings of the word "objection" in relation to the right to enter reservations to treaties should not be made clearer. The Special Rapporteur, who persists in his view that the word "objection" should be replaced by "opposition" in draft guidelines 2.3.1 to 2.3.3, believes that it would be sufficient to make this clear in the commentary on draft

[157] See para. 75, above.

[158] See para. 76. It might be noted that the definition of interpretative declarations adopted by the Commission in draft guideline 1.2 does not mention a time element.

[159] Article 20, para. 4 (b), of the Vienna Convention of 1969 speaks only of the "contracting State".

[160] See B, below.

[161] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 489, para. (23) of the commentary on draft guideline 2.3.1.

guideline 2.6.1. If the Commission were to disagree, attention might be drawn to the problem through a draft guideline 2.6.1 bis (or the second paragraph of draft guideline 2.6.1):

2.6.1 bis *Objection to late formulation of a reservation*

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation.

102. Third and last, the objective sought by the author of an objection is at the very heart of the definition of objections proposed above. This objective is the result of combining article 20, paragraph 4 (b), and article 21, paragraph 3 of the Vienna Conventions. The latter provision defines both the "maximum"[162] objective which a State or an international organization may seek in formulating a reservation: preventing the treaty from entering into force in its relations with the author of the reservation, and its minimum objective: preventing the application of the provisions to which the reservation relates, in those same relations, "to the extent of the reservation".

103. This procedure is in keeping with that used in the definition of the reservations themselves, which must purport "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to the author of the reservation. And it is understood that, although this objective constitutes the very criterion of a reservation, its inclusion in the definition would not indicate, in any specific case, whether the reservation is valid and does indeed produce the effect sought. The same is true of an objection: to merit the term, a unilateral statement must purport to produce one of the effects provided for in the Vienna Conventions, but that will not necessarily be the case: to that end, the objection itself must be permissible. This question is not one of definition but of the legal regime of objections and will be discussed later on.

104. Another point is worthy of comment. Draft guideline 1.1.1, adopted by the Commission in 1998,[163] states that a reservation purports to exclude or modify, as necessary, the legal effect "of the treaty as a whole with respect to certain specific aspects in [its] application to the State or to the international organization which formulates the reservation". The question then arises whether this detail should not be reflected in the definition of objections. The definition proposed above[164] refers exclusively to the usual objective of reservations, which relates to certain provisions of the treaty; however, "across-the-board" reservations are far from isolated occurrences[165] and they, like all reservations, are obviously open to objection. This explanation could be included in the commentary on draft guideline 2.6.1; it would, however, be logical to echo draft guideline 1.1.1 in a special draft guideline supplementing the definition of objections, which might read as follows:

2.6.1 ter *Object of objections*

When it does not seek to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection,

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[162] See paras. 96 and 97, above.

[163] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 235-245.

[164] See para. 98.

[165] See the above-mentioned commentary (footnote 162) on draft guideline 1.1.1, para. (5), pp. 242-243.

an objection purports to prevent the application of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which has formulated the objection, to the extent of the reservation.

105. Another possibility would be to include this hypothesis in draft guideline 2.6.1 itself, which would then read as follows:

2.6.1 *Definition of objections to reservations*

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates, or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.

This is the most "economical" solution, its only disadvantage being its unwieldiness.

106. One last problem should be mentioned. As he indicates above,[166] the Special Rapporteur is firmly of the view that, *de lege lata*, a State or an international organization is not at all obliged to give the reasons for its objection to a reservation. It is purely a question of judgement, which may be based on legal reasons, but which may also, and quite legitimately, be related to political concerns.[167] Nevertheless, it is probably advisable for the reasons motivating the objection to be communicated to the author of the reservation, especially if the author of the objection wishes to persuade it to review its position. The question therefore arises whether the Commission should make a recommendation to that effect to States and international organizations, as it has done on other occasions.[168] The Special Rapporteur is therefore of the view that this question, which is one aspect of the "reservations dialogue", should be revisited in section 2 of this chapter.

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[166] Para. 94.

[167] This is very frequently the case — see, for example, P. H. Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, pp. 419-434.

[168] See, for example, draft guideline 2.5.3 (*Periodic review of the usefulness of reservations*).